Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1897

G. G. S., INC.,

Petitioner,

vs.

LINOLEX SYSTEMS, INC., and MINNESOTA MINING & MANUFACTURING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this matter on January 23, 1980.

OPINIONS OF COURTS BELOW

The January 23, 1980, opinion of the Court of Appeals, the basis for the judgment herein sought to be reviewed, was entered as an unpublished order pursuant to Rule 35 of the Rules of the United States Court of Appeals for the Seventh Circuit and is reprinted in the Appendix to this Petition, pp. 1-13. An order entered by the Court of Appeals on March 3, 1980, denying rehearing is also unpublished and reprinted in the Appendix, p. 14. Prior opinions of the United States District Court for the Northern District of Illinois entered on July 14, 1978, and November 8, 1978, are also unreported and reprinted in the Appendix, pp. 15-18 and 19-20.

STATEMENT OF JURISDICTIONAL GROUNDS

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 23, 1980, and the denial of the petition for rehearing entered on March 3, 1980. The jurisdiction of this Honorable Court is invoked pursuant to Section 1254(1) of the Judicial Code, 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals disregarded the clear mandate of this Court concerning the standard for review of an appeal from the granting of summary judgment and, in so doing, abridged petitioner's Seventh Amendment right to trial by jury by weighing conflicting facts and circumstances and the inferences to be drawn therefrom in order to ascertain the intent of the parties with respect to contractual language determined by the Court of Appeals to be ambiguous.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

RULE 56 of the Federal Rules of Civil Procedure:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

Rule 56, Fed. R. Civ. P. 28 U. S. C. A.

STATEMENT OF THE CASE

On August 24, 1976, petitioner G. G. S., Inc. ("G. G. S.") an Illinois corporation, filed a two count Complaint in the United States District Court for the Northern District of Illinois alleging that defendant Linolex Systems, Inc. ("Linolex") breached its distributorship agreement with G. G. S. by wrongfully terminating that agreement and that defendant Minnesota Mining & Manufacturing Company ("3M") wrongfully interfered with the contractual relationship between Linolex and G. G. S. by inducing Linolex to terminate the distributorship agreement. Jurisdiction was based upon diversity of citizenship. Trial by jury was demanded by G. G. S.

The Evidence

The complaint arose from an agreement entered into on January 4, 1973, between G. G. S. and Linolex, a Massachusetts corporation, whereby G. G. S. agreed to market and distribute Linolex's word processing computer systems.[1] Starting in January of 1973, pursuant to the terms of the agreement, G. G. S. began marketing Linolex's computer systems. In April of 1975, defendant 3M acquired Linolex. On October 2, 1975, G. G. S. received a letter from Linolex that read in its entire text as follows:

> Please take notice that we are hereby terminating the Sales Representative Agreement between Linolex Systems, Inc., and your Company dated January 4, 1973, effective January 1, 1976. This termination is made in accordance with Article 14 of the said Agreement.

G. G. S. protested the proposed termination without success and the instant lawsuit followed.

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1. Since the case was decided on the basis of summary judgment, the statement of facts is drawn from the pleadings, affidavits and depositions on file in this matter. Rule 56(c), Fed. R. Civ. P.

The case as presented to the lower courts involved the construction of several portions of the agreement. Section VI, Article 14, referred to in the letter of termination, reads as follows:

> 14. TERM. This Agreement shall remain in effect for a period of two (2) years from the first day of January of the year following the date hereof, and shall be renewed automatically for two (2) year extensions unless at least three (3) months prior to the expiration of the original or any extended term, as the case may be, one of the parties hereto notifies the other of its election to terminate this Agreement at the expiration of the expiring term.
>
> It is the intention of COMPANY [Linolex] that this Agreement shall be terminated only upon DISTRIBUTOR'S [G.G.S.'s] failure to meet COMPANY determined standards or performance. COMPANY reserves the right from time to time to change the standards of performance and to determine in its own discretion whether said standards have been met by DISTRIBUTOR.

Section VII, Article 4 of the agreement provided that the validity, performance, and construction of the agreement was to be governed and interpreted in accordance with Massachusetts law.

The pleadings, depositions and affidavits on file in this matter contain numerous factual statements relating to the intent of the parties in drafting the second subparagraph of paragraph 14. Neither that subparagraph (nor its substantial equivalent) was included in a prior draft of the agreement, which contained a clause that permitted either party to terminate the agreement at any time with or without cause on 90 days notice. The "without cause" language was deleted from the final agreement. The difference between the draft and final agreement was explained in an affidavit filed by the two officers of G. G. S. who negotiated the agreement.[2] The final formulation of paragraph 14 was

2. Since the issue of the unenforceability of paragraph 14 was raised sua sponte by the district court in ruling on a motion that was presented on other grounds, the affidavit was filed in conjunction with G. G. S.'s motion for reconsideration.

drafted to protect G. G. S.'s investment of time, effort, and money from arbitrary termination after G. G. S. had developed a market for Linolex's sophisticated, yet hitherto unmarketed products. Linolex was obviously concerned with retaining the right to terminate an incompetent or inadequate distributor. The final agreement sought to resolve the conflicting concerns by establishing the requirement that G. G. S. meet standards of performance to be defined by Linolex. G. G. S.'s officers also averred to their belief that they were negotiating a meaningful and binding article of agreement and not simply some unenforceable surplusage.[3]

Proceedings Below

On February 7, 1978, G. G. S. moved for the entry of partial summary judgment on the sole issue of the timeliness of Linolex's notice of termination. Linolex responded with its own motion for summary judgment on Count I, arguing that the notice of termination was timely and that a limitation of damages clause in the agreement precluded all relief. The district court ignored the arguments of both parties and entered partial summary judgment for Linolex on the basis that paragraph 14 of the agreement, dealing with standards for termination of the contract, was "precatory" and not enforceable by G. G. S.[4] An

3. Until the district court in its July 14, 1978, order found paragraph 14 to be precatory and unenforceable, Linolex proceeded in the litigation as if it believed that the paragraph was meaningful. In its answer, Linolex plead the defense that the agreement was terminated for cause but never suggested that paragraph 14 was unenforceable. Moreover, Linolex answered G. G. S.'s interrogatories concerning the standards of performance under paragraph 14 without objection or qualification that the paragraph was illusory and that the standards of performance were, therefore, irrelevant. *A fortiori* Linolex did not argue to the district court that the paragraph was unenforceable.

4. The remainder of the case was decided upon the stipulation of the parties that Count II, alleging tortious interference with contract was not viable in light of the district court's ruling that the contract was lawfully terminated and upon an agreed statement of

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appeal to the United States Court of Appeals for the Seventh Circuit pursuant to Section 1291 of the Judicial Code, 28 U. S. C. § 1291, followed.

On appeal to the Seventh Circuit, G. G. S. raised two issues: (1) the district court erred in holding that Linolex had exercised its option to terminate in a timely manner and, (2) the district court erred in holding that the grounds for termination under Article 14 were precatory and unenforceable. As to the second issue, G. G. S. prayed that the court remand the cause for trial on the issue of whether Linolex's determination regarding G. G. S.'s compliance with the standards of performance had been reasonably and honestly made. Linolex argued that the notice of termination was timely and that paragraph 14 was "precatory" and unenforceable as a matter of law.

The Court of Appeals adopted Linolex's argument on the first issue in Section II. A. of its opinion. App. pp. 4-8. However, on the second issue, the Court of Appeals seemingly rejected the contentions of both parties and concluded that paragraph 14 was ambiguous and, accordingly, subject to interpretation through review of the surrounding facts and circumstances. The Court thereupon conducted an inquiry into "all the circumstances" in the record relating to the issue of intent and concluded that the parties had not intended paragraph 14 to be enforceable.

G. G. S. petitioned the Court of Appeals for rehearing on the grounds that the court, after concluding that the contractual provisions regarding termination were ambiguous, should have remanded the case for trial by jury. In an order entered on March 3, 1980, the Court of Appeals denied G. G. S.'s petition for rehearing.

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facts, concerning the amount of a set off claimed by Linolex against certain commissions admittedly due and owing to G. G. S. based on its sales efforts prior to termination. On May 14, 1979, the district court entered a judgment awarding G. G. S. a portion of the commissions it sought and dismissed Count II.

ARGUMENT

THE COURT OF APPEALS FAILED OR REFUSED TO FOLLOW THE CLEAR MANDATE OF THIS COURT CONCERNING THE PROPER STANDARD FOR REVIEW OF AN APPEAL FROM THE GRANTING OF SUMMARY JUDGMENT BY WEIGHING THE CONFLICTING FACTS AND CIRCUMSTANCES AND THE INFERENCES TO BE DRAWN THEREFROM IN ORDER TO ASCERTAIN THE INTENT OF THE PARTIES WITH RESPECT TO A CONTRACTUAL CLAUSE THAT THE COURT FOUND TO BE AMBIGUOUS

A writ of certiorari to the United States Court of Appeals for the Seventh Circuit is sought to rectify an obvious and substantial departure by that court from the long established and clearly defined standard for reviewing appeals from the granting of summary judgment. The improper application of law occurs in Section II. B. of the opinion, dealing with the construction of paragraph 14 of the agreement. Paragraph 14 reads in pertinent part as follows:

> It is the intention of COMPANY [Linolex] that this Agreement shall be terminated only upon DISTRIBUTOR'S [G. G. S.'s] failure to meet COMPANY determined standards of performance. COMPANY reserves the right from time to time to change the standards of performance and to determine in its own discretion whether said standards have been met by DISTRIBUTOR.

G. G. S. had argued to the Court of Appeals that this paragraph should be enforced[5] and that the case should be remanded to

5. G. G. S. relied heavily upon the decision in *E. I. DuPont De Nemours & Co.* v. *Clairborne-Reno Co.*, 64 F. 2d 225, 228 (8th Cir.), *cert. denied*, 290 U. S. 646 (1933), where, in examining a distributorship agreement, the court stated:

> Where one corporation presents to another corporation a form of agreement reciting, 'It is understood and agreed that this

(Footnote continued on next page.)

the district court for resolution of the issue of whether Linolex's determination regarding G. G. S.'s compliance with the standards of performance had been reasonably and honestly made.[6] Linolex argued that the above-quoted language was clearly and unambiguously "precatory" and that it could terminate G. G. S. under paragraph 14 without a showing of cause.[7]

The Court of Appeals rejected both contentions and concluded that paragraph 14 was ambiguous and, accordingly, subject to interpretation through review of the surrounding facts and circumstances.[8] However, after finding that paragraph 14 was ambiguous and subject to interpretation through the sur-

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> contract is entered into upon the following conditions: That *it is our intention* and desire to continue under this agreement so long as your services, in our judgment, prove satisfactory,' we have no doubt that such language would ordinarily be understood to mean a promise to continue until dissatisfied. [Emphasis added].

6. Under Massachusetts law, which governs the subject agreement, contracts which measure one party's performance by the other party's satisfaction are subject to the requirement that the determination of satisfaction be made reasonably and honestly. *Salem Glass Co.* v. *Joseph Rugo, Inc.*, 343 Mass. 103, 176 N. E. 2d 30 (1961); *Hawkins* v. *Graham*, 149 Mass. 284, 21 N. E. 312 (1889) (Holmes, J.).

7. As noted earlier, the legal position that the contractual language was "precatory" was first advanced by the trial court in ruling on Linolex's motion for summary judgment.

8. The Court of Appeals stated:

> Not every expression of intent can properly be called a promise. Often a statement of intent merely expresses a desire or a state of mind. "An expression of intention is not a promise unless it is communicated to one or more persons under such circumstances that they will expect performance and may reasonably act in reliance upon the expression." *Corbin on Contracts*, § 15 at 22 (1 Vol. ed. 1952). It is often difficult to distinguish between promises and non-binding statements of intention. The distinction "must be drawn by making what seems to be a reasonable interpretation of the expressions of the parties in light of the surrounding facts. . . .

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rounding facts and circumstances, the Court of Appeals failed to follow the clear directive of *United States* v. *Diebold, Inc.*, 369 U. S. 654 (1962), and remand the cause to the district court for trial by jury on the issue as to the intent of the parties.

The error in the Court of Appeal's disposition of the case is perhaps most clearly shown by reference to the decision itself. On the bottom of page 7 and the beginning of page 8, of the opinion, App. at 9, the court discusses the conditions under which a statement of intention is a binding promise rather than a desire or state of mind. The court relies on Professor Corbin's treatise and concludes its analysis by quoting from *Corbin on Contracts*, § 15 at 22 (1 Vol. ed. 1952):

> The distinction [between mere statements of future intent and binding promises] "must be drawn by making what seems to be a reasonable interpretation of the expressions of the parties in light of the surrounding facts. . . ." App. at 9.

The court's error lies in the ellipsis. The full quotation from *Corbin on Contracts* is:

> The line of distinction between promises and such non-promissory statements of intention is in many cases difficult to draw. It must be drawn by making what seems to be a reasonable interpretation of the expressions of the parties in the light of the surrounding facts—*an interpretation that must be made by a jury, or by a judge acting in the jury's place.*" *Corbin on Contracts*, § 15 at 22 (1 Vol. ed. 1952) (Emphasis added).

Clearly, the emphasized language indicates the proper disposition of this case. Under Massachusetts law, as under the law in

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The court also described the contractual language as an "ambiguous expression," App. at 10, and in commenting upon a case cited by G. G. S. which held virtually identical language to be enforceable, noted that "[w]hether a certain expression is a promise or merely an expression of a desire or a state of mind is necessarily a question not receptive to a rigid rule but depends on all the circumstances of a given case." The court concluded, "Here, looking at all the circumstances indicates this language is not mandatory." App. at 11, n. 10.

all or most jurisdictions, when a contract is held ambiguous on its face, the parties may testify as to what they understood the contract to mean and the jury will then determine the terms of the contract and apply those terms.[9] In this case, G. G. S.'s understanding of the terms of the agreement was presented to the district court through the affidavit of two of its officers who had personally negotiated the agreement. The unqualified understanding of these two officers was that G. G. S. intended paragraph 14 to be enforceable rather than illusory. Indeed, Linolex presented no evidence suggesting that its understanding of the meaning of paragraph 14 was any different than that of G. G. S.

Instead of remanding the action to the district court for a trial by jury, the Court of Appeals determined the meaning of the ambiguous clause by its own fact-finding process. It considered certain of the relevant facts and circumstances and then drew inferences from those facts and circumstances favorable to Linolex. This is clear from the decision. The court "found"[10] the significance of paragraph 14 by concluding that if the parties "wanted" to make it binding they could have used alternate language instead of "it is the intention." Moreover, the court noted that "reading the contract's termination provisions as a whole suggests that the parties did not intend termination or nonrenewal at the end . . . only for failure to meet standards of performance" and commented that the termination provision of

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9. In *Trafton* v. *Custeau,* 338 Mass. 305, 307-08, 155 N. E. 2d 159, 161 (1959), the court stated:

> Where the terms of a written contract are ambiguous, both parties may testify as to what they understood by the terms of the contract when they executed it. The jury will then determine what were its terms and apply the law to such facts as they find comprised its terms.

10. "That is, we find the contract did not require noncompliance with standards of performance before Linolex could terminate the agreement at the end of the term, but the contract permitted Linolex to refuse to renew the contract for any reason." App. at 9.

paragraph 15[11] "appears to make the last sentence of paragraph 14, as interpreted by G. G. S., redundant."[12] Finally, the appellate court, after describing the language of paragraph 14 as ambiguous, stated:

> We feel that if a lack of mutuality for termination was intended the parties would have indicated this effect more explicitly.

The court's language amply demonstrates that it was drawing inferences from certain of the facts and circumstances and it is clear that these inferences were not drawn in favor of G. G. S., the party opposing the summary judgment.

G. G. S. petitioned the Court of Appeals for rehearing in order to alert that court to its substantial departure from the previously unquestioned standard for review of appeals from the granting of summary judgment. In that petition, G. G. S. cited the decision of this Court in *Diebold* and several decisions from the Seventh Circuit to the same effect. Moreover, it was emphasized that the panel of the Court of Appeals had based its initial decision on a theory that was not argued by either of the parties in the district or appellate court so that the evidence in the record had not been marshalled by either party for the purpose of explaining the ambiguity in paragraph 14.[13] The petition for rehearing was denied without comment.

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11. G. G. S. interprets the "for cause" language of paragraph 15 to apply only to causes capable of non-subjective determination such as those events listed in its second section (insolvency, bankruptcy, discontinuance of business, etc.).

12. G. G. S. argued to the appellate court that this holding, also made by the district court, is contrary to *Nice Ball Bearing Co.* v. *Lescure,* 227 F. 2d 118, 120 (7th Cir. 1955), wherein the court stated:

> In arriving at their intentions effect must be given to each word, clause or term employed by the parties; none should be rejected for lack of meaning or surplusage.

13. See *Fountain* v. *Filson,* 336 U. S. 681 (1949).

In its treatment of the factual issue as to the intention of the parties in drafting paragraph 14, the Court of Appeals departed from the holdings of this Court in cases such as *Diebold* and *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620 (1944). This departure is magnified by the fact that G. G. S. demanded trial by jury. *Weinberger* v. *Hynsen, Westcott & Danning*, 412 U. S. 609, 621-622 (1973).

Through its actions in this case, the Court of Appeals (or at least the panel involved in this case) has adopted sub silentio a rule of law in direct conflict with the standards articulated by this Court. Moreover, by ordering the decision in this case to be unpublished and uncitable, the Court of Appeals has created an unwritten and unknown standard.[14] Issuance of the writ, therefore, is necessary to rectify the obvious and substantial departure by the Court of Appeals from the clearly defined standard for reviewing appeals from the granting of summary judgment.

WHEREFORE, G. G. S. prays that this Honorable Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and review this case.

Respectfully submitted,

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14. G. G. S. does not know how many other cases, if any, were disposed of under the standard used in this case. However, only five cases dealing with Rule 56 were reported from the Seventh Circuit in 1979, which raises the possibility that a number of appeals from summary judgment are being disposed of by unpublished order following inappropriate standards. 1979 Seventh Circuit Digest v. 4 No. 12.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued: November 27, 1979
January 23, 1980.

Before

Hon. Latham Castle, *Senior Circuit Judge*
Hon. Wilbur F. Pell, Jr. *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*

G. G. S. Inc., an Illinois corporation,
Plaintiff-Appellant,
Cross-Appellee,
Nos. 79-1574 & 79-1607

vs.

Linolex Systems, Inc.,
a Delaware corporation,
Defendant-Appellee,
Cross-Appellant,

and

Minnesota Mining & Manufacturing Company, a Delaware corporation,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-3136

Thomas R. McMillen, Judge.

ORDER

This case involves the interpretation of a contract entered into by G. G. S., Inc., plaintiff-appellant and cross-appellee,

and Linolex Systems, Inc., defendant-appellee and cross-appellant. The district court partially granted defendants'[1] motion for summary judgment finding that Linolex had exercised its option to terminate the contract in a timely fashion pursuant to paragraph 14 of the section of the contract entitled "TERM OF AGREEMENT AND TERMINATION" (paragraph 14) and that termination pursuant to paragraph 14 did not require a finding that plaintiff failed to meet company determined standards of performance. The court also found that defendant Linolex was not entitled to set off commissions paid to G. G. S. on accounts where Linolex failed to receive full payment from lessees, against commissions Linolex admittedly owed G. G. S. We affirm the grant of summary judgment on all issues.

I. Facts

In January of 1973, G. G. S., an Illinois corporation, entered into a written contract with Linolex, a Massachusetts corporation. In the contract, G. G. S. agreed to distribute and market Linolex's word processing machines. The agreement was modified twice—once on July 10, 1973 to change the designation of G. G. S. under the contract from "Distributor" to "Sales Representative," and again on July 1, 1975 to set out a schedule of commissions to be paid G. G. S. In January of 1973, G. G. S. began marketing Linolex word processing machines pursuant to the contract.

The contract was a term contract. The first term was to run from the time of signing through two years after January 1, 1974, or until December 31, 1975. The contract further provided that the contract would be renewed automatically for a two year period unless either party gave notice three months prior to the end of the term of its election to terminate the contract. Paragraph 14 of the contract also contained a provision that it was Linolex's intention that the contract would only

1. Minnesota Mining & Manufacturing Co. (3M) which wholly owns Linolex, was also named as a defendant.

be terminated upon G. G. S.'s failure to meet Linolex determined standards of performance.

In the fall of 1975, Linolex decided to terminate the agreement. On September 26, 1975, Linolex wrote a letter to G. G. S. notifying G. G. S. that it was terminating the agreement effective December 31, 1975. The letter was postmarked September 29, 1975 and sent by certified mail to G. G. S. The letter was sent to an old address of G. G. S. from which G. G. S. had moved more than a year earlier. G. G. S. received the letter on October 2, 1975 after the Postal Service forwarded it to G. G. S.'s then current principal address.

On August 24, 1976, G. G. S. filed a two-count complaint against Linolex and 3M in the United States District Court for the Northern District of Illinois.[2] Count I of the complaint contained allegations that Linolex had wrongfully terminated the agreement. Count II contained allegations that 3M had tortiously interfered with the relationships under the contract. The parties made cross motions for summary judgment. On July 14, 1978, the district court entered partial summary judgment for the defendants on Count I holding that the contract had not been wrongfully terminated.[3]

Thereafter, in January 1979 the parties entered into a stipulation stating that if the district court's decision was correct then 3M had a valid and sufficient defense to Count II of the complaint.[4] On May 14, 1979, the district court entered final judgment dismissing Count II and setting damages for G. G. S. on claimed commissions.

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2. Federal jurisdiction was based on diversity of citizenship.

3. Plaintiff then filed a petition for reconsideration with the district court. The court set a further schedule and, after briefs had been filed, denied plaintiff's motion.

4. On January 16, 1979, the parties entered into a separate stipulation concerning commissions, which it was claimed Linolex owed to G. G. S. This issue will be discussed in part III *infra*.

II. Was the Termination Wrongful?

A.

Plaintiff G. G. S. first argues on appeal that the district court erred in holding that Linolex had timely exercised its option to terminate the contract. G. G. S. contends Linolex did not comply with the provisions of the contract governing notice of termination and therefore the termination was not effective.

Paragraph 14 of the contract deals with the term of the contract. It provides that the agreement shall remain in effect for two years following January 1, 1974 and provides for automatic renewal for two year extensions unless at least three months prior to the expiration of the then current term one of the parties notifies the other of the election to terminate at the end of the term.[5] The paragraph dealing with notices in the contract, paragraph 8 of the section entitled "GENERAL PROVISIONS," provides that all notices in the agreement shall be in writing and "shall be deemed to be received if delivered personally or sent by mail to a proper agent of the COMPANY [Linolex] or DISTRIBUTOR [G.G. S.], at their respective current principal and regular places of business."

G. G. S. contends these provisions were not met because Linolex did not mail the notice to G. G. S.'s "current principal and regular place of business" and because G. G. S. did not receive the notice until October 2, 1975, less than three months prior to the end of the contract term. Plaintiff further argues that since the termination provision of the contract was an option replete with "time is of the essence" considerations the

5. Paragraph 14 provides in relevant part:

TERM: This Agreement shall remain in effect for a period of two (2) years from the first day of January of the year following the date hereof, and shall be renewed automatically for two (2) year extensions unless at least three (3) months prior to the expiration of the original or any extended term, as the case may be, one of the parties hereto notifies the other of its election to terminate this Agreement at the expiration of the expiring term.

"untimely" notice was ineffective. Plaintiff further claims that in Massachusetts,[6] courts require notice actually to be received by the party to be notified in order for it to be effective. Plaintiff relies on *Costello* v. *Board of Appeals of Lexington*, 333 N. E. 2d 210, 212 (Mass. App. Ct. 1975) and *Regan* v. *Atlantic Refining Co.*, 304 Mass. 353, 354, 23 N. E. 2d 869, 870 (1939), for its position that depositing notice in the mail may be evidence of notice but it does not itself constitute notice.

We believe that notice was mailed in a timely fashion pursuant to the contract. Paragraph 8 provides that notice is deemed received when sent by mail. Here notice was mailed on September 29, 1975, more than three months prior to the end of the term. The fact that it was not actually received until October 2, 1975 is of no consequence on the timeliness issue because the contract provides that notice is "deemed received" when sent by mail.

Massachusetts law is not to the contrary, Massachusetts law provides that " '[i]n the absence of express provision to the contrary, a notice is not given until received by the person to be notified.' " *Costello*, 333 N. E. 2d at 212 (quoting *Regan*, 304 Mass. at 304, 23 N. E. 2d at 870). In this contract there was an express provision. Paragraph 8 states explicitly that notice "shall be deemed to be received if . . . sent by mail. . . ." This indicates the parties have expressly adopted the "mailbox" rule and thus the notice was effective when mailed on September 29, 1975. *See Survey & Research Service, Inc.* v. *Director of the Division of Employment Security*, 352 Mass. 475, 476-77, 226 N. E. 2d 259, 260-61 (1967).

G. G. S. argues, however, that because the notice was not sent by mail to its current principal and regular place of business, as required by paragraph 8, but to its former place of business, that the notice of termination was ineffective to terminate the agreement within the required time. In essence, it

6. The contract provided and the parties do not contest that Massachusetts law applies to this contract dispute.

argues that if the notice of termination is not actually received within the three month period (here it was not received until October 2nd) then the notice must not only be mailed prior to the three month period but also must be properly addressed to be timely and effective. That is, they attempt to translate the inaccurate address of the notice into a conclusion that this causes the notice to be untimely.

We disagree that, in this case, the incorrect address on the notice makes the notice untimely and ineffective. It is undisputed that Linolex mailed the notice to G. G. S.'s former address, which does not comply with the formal requirement of the contract that notice be sent to the current and principal business address of the other party. In all other respects we have concluded that the notice was mailed in a proper fashion.

The improper use of the former address, while technically improper, was a minor mistake which does not render the notice ineffective. Plaintiff still received the notice promptly (within three days of the date it was sent) and there is no indication of any prejudice to G. G. S. caused by the improper address. Under such circumstances noncompliance with the technical form of the notice does not render the notice ineffective. G. G. S. still received the notice and was able to act on it in a timely fashion.[7] Since the purposes for which notice was intended were satisfied we feel, in this case, it would be exalting form over substance to hold that the termination was wrongful. *Restaurant Associates Industries, Inc.* v. *Anheuser-Busch, Inc.*, 422 F. Supp. 1105, 1108 (S. D. N. Y.) (1976), *aff'd in part, rev'd in part*, 559 F. 2d 1205 (2d Cir. 1977) (mem. op.).

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7. Plaintiff cites *Gulf Ins. Co.* v. *Riddle*, 199 S. W. 2d 1000 (Tex. Civ. App. 1947), for the proposition that an improper address renders the notice ineffective. In that case, however, the inaccuracy of the address prevented the party from ever receiving notice. That is a very different case than this one, where the notice was sent to the address of the former office of G. G. S. and was forwarded so as to arrive at the proper address within three days of the date it was first placed in the mail.

G. G. S. does contend that the incorrect address caused a delay in the receipt of the notice and since the termination provision was an option, replete with "time is of the essence" concerns that this delay renders the termination ineffective. We need not decide whether the termination provision was an option because we find that the notice was timely. The contract contemplated that notice would be effective if mailed at least three months prior to the end of the term, even if it was not received until a point in time less than three months prior to the end of the term. Here the notice was received only two days outside the three month period, a period which the parties must have contemplated under certain circumstances would be timely.[8] The slight delay caused by the improper address does not render the notice untimely. The notice was received in a period within the contemplation of the parties to the agreement.

Plaintiff argues, for the first time on appeal, that notice was ineffective because it was not in compliance with the second sentence of paragraph 8 of the section entitled "GENERAL PROVISIONS." This second sentence provides "Unless otherwise stated herein, all Notices shall be sent for receipt ten (10) days in advance of the action to be taken which requires notice." Plaintiff reads this provision to require that notice of termination, which under paragraph 14 must be made three months prior to the expiration of the term, must be received ten days prior to the "action to be taken" (which here, plaintiff argues is the notification of termination) to be effective. Thus, plaintiff contends there must be an actual notice period of three months and ten days. We disagree.

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8. If the notice had been properly addressed and mailed on or before September 30th, G. G. S.'s counsel conceded at oral argument that the notice would have been timely when received on October 2nd. Also we have concluded that if notice was sent by mail to the wrong address and actually received before September 30th that the notice would also be timely and effective. Since combining the two propositions does not prejudice G. G. S.'s rights at all, we conclude that the notice addressed incorrectly but received on October 2nd is effective and timely.

First we note that "an issue not presented in the court below cannot be raised for the first time on appeal and form a basis for reversal." *County Fairways, Inc.* v. *Mottaz,* 539 F. 2d 637, 642 (7th Cir. 1976) (per curiam). *See also McElearney* v. *University of Illinois at Chicago Circle Campus,* No. 79-1254, slip op. at 3 (7th Cir. Dec. 21, 1979). Since this argument was not raised in the trial court we need not consider it.

Considering it, however, we note that plaintiff's argument has no merit. The second sentence only applies when not otherwise stated in the contract, that is, when no time for notice is provided in the contract. Paragraph 14, however, does state that notice must be made three months before termination. Since paragraph 14 contains a time and method for notice of termination the second sentence of paragraph 8 does not apply to paragraph 14 terminations.

In addition, paragraph 8 by its term requires receipt of notice ten days before "the action to be taken which requires notice." Under paragraph 14 the action to be taken which requires notice is termination not the giving of notice prior to termination. We find the suggestion that sending notice itself is the action to be taken which requires notice is an unreasonable construction of this contract provision. Giving notice of termination does not in and of itself require notice and thus "the action to be taken which requires notice" is the termination. So, even if this sentence of paragraph 8 applies it was satisfied because G. G. S. received notice more than ten days before termination.

B.

Plaintiff G. G. S. next argues that the termination was wrongful because Linolex did not terminate upon G. G. S.'s failure to meet Linolex determined standards of performance as required by paragraph 14 of the contract. The relevant section of paragraph 14 provides:

> It is the intention of COMPANY that this Agreement shall be terminated only upon DISTRIBUTOR'S failure to meet

> COMPANY determined standards of performance. COMPANY reserves the right from time to time to change the standards of performance and to determine in its own discretion whether said standards have been met by DISTRIBUTOR.

The district court held that this provision of paragraph 14 was "precatory and not enforceable" and thus, the termination was not wrongful.[9] Plaintiff argues that such an interpretation of the sentence effectively reads it out of the contract, a holding contrary to the basic tenet of statutory construction that whenever practical every word shall be given effect. *See Hagerty* v. *Myers,* 333 Mass. 387, 388, 131 N. E. 2d 176, 177 (1955).

Not every expression of intent can properly be called a promise. Often a statement of intent merely expresses a desire or a state of mind. "An expression of intention is not a promise unless it is communicated to one or more persons under such circumstances that they will expect performance and may reasonably act in reliance upon the expression." *Corbin on Contracts* § 15 at 22 (1 vol. ed. 1952). It is often difficult to distinguish between promises and non-binding statements of intention. The distinction "must be drawn by making what seems to be a reasonable interpretation of the expressions of the parties in light of the surrounding facts. . . ." *Id.*

In this case, we are convinced that Linolex's expressed "intention" to terminate "only upon [G. G. S.'s] failure to meet [Linolex] determined standards of performance . . ." is not a promise binding on Linolex. That is, we find the contract did not require noncompliance with standards of performance before Linolex could terminate the agreement at the end of the term, but the contract permitted Linolex to refuse to renew the contract for any reason. We reach this conclusion for several

9. Suggesting that the district court misused the term "precatory," G. G. S. asserts that the district court's decision was the first one in American jurisprudence to hold contractual language "precatory." Regardless of the technical accuracy of the term, the district court concluded that the language of paragraph 14 was not mandatory.

reasons. First the contract provided "[i]t is the intention" of Linolex that it will not terminate but for the stated reason. If the parties wanted to make it clear that this had a mandatory and binding effect the use of the words "it is agreed that Linolex will not terminate" or "Linolex shall not terminate" could easily have been used. These alternatives were not used.

Second, reading the contract's termination provisions as a whole suggests that the parties did not intend termination or nonrenewal at the end of the contract's term to occur at Linolex's option only for failure to meet standards of performance. Paragraph 15 of the section of the contract entitled "TERM OF AGREEMENT AND TERMINATION," which applies to termination of the contract at times other than at the end of the term, provides that the contract may be terminated at any time by either party *for cause* provided ninety days notice is given. This would seem to permit termination at any time for failure to meet designated standards of performance. This clause appears to make the last sentence of paragraph 14, as interpreted by G. G. S., redundant. Alternatively, it makes it more difficult to terminate a contract at the end of its term than in the middle of the term of the contract. We will not construe an ambiguous expression to have these effects absent a clearer expression of intent, (*Stop & Shop, Inc.* v. *Ganem*, 347 Mass. 697, 200 N. E. 2d 248 (1964) ("Justice, common sense and the probable intention of the parties are guides to construction of a written instrument,")), and thus hold that the use of the phrase "it is the intention" is not mandatory.

Finally, we note that our conclusion that the last sentence of paragraph 14 is not binding and enforceable gives each party the same ability and discretion to terminate the agreement at the end of the term. If we were to hold the language was binding on Linolex, G. G. S. could decide not to renew the contract at the end of the contract's terms and thus be able to terminate merely by notifying Linolex. Linolex, however, would need to show that G. G. S. failed to meet standards of performance

before it could terminate. We feel that if a lack of mutuality for termination was intended the parties would have indicated this effect more explicitly.[10] Therefore, we hold that Linolex's termination of the contract was not unlawful.

III. Who Bears the Risk of Noncollection of Accounts Receivable?

In the original agreement between G. G. S. and Linolex, entered into on January 4, 1973, G. G. S. was a distributor of Linolex's products—purchasing products from Linolex for resale. In a letter dated July 10, 1973, the parties agreed to change this relationship. G. G. S. became a sales representative of Linolex. Linolex was to designate a price and G. G. S. was to receive a commission for sales and leases as detailed in this letter.

Linolex paid commissions to G. G. S. on orders for leases of Linolex equipment by three customers before Linolex received full payment from these customers. Later it developed that these customers would not fully pay for the ordered equipment. Linolex thus paid G. G. S. commissions of $7,295.22 for leased equipment for which Linolex never received payment from the customers. Linolex contends that it is entitled to set off this amount against commissions which it acknowledges it owes G. G. S. The district court disagreed with Linolex's contention finding that Linolex owed G. G. S. $15,805.09 in commissions, not $8,509.87 which would be the proper amount if the claimed setoff was permitted.

G. G. S. does not dispute that any party in litigation has a theoretical right to a setoff for overpayments. That is, if Linolex

10. G. G. S. argues that *E. I. DuPont De NeMours & Co.* v. *Clairborne-Reno Co.*, 64 F. 2d 224 (8th Cir.), *cert. denied*, 290 U. S. 646 (1933), establishes that use of the language "it is our intention" is ordinarily understood to be a binding promise. Whether a certain expression is a promise or merely an expression of a desire or a state of mind is necessarily a question not receptive to a rigid rule but depends on all the circumstances of a given case. Here, looking at all the circumstances indicates this language is not mandatory.

did not owe G. G. S. commissions until Linolex received payment on the orders, then G. G. S. concedes that Linolex could set off the amounts it overpaid. G. G. S. does contest, however, Linolex's position that G. G. S. bears the risk of noncollection under the contract.

There are three contractual provisions which the parties contend determine this issue. The first, paragraph 7 of the July 10 letter, provides:

> "(7) That Linolex shall be responsible for the billing and collection of all costs for all products sold by G. G. S. including all transportation, insurance, shipping fees, taxes, and other charges."

The second, paragraph 8 of the same letter provides:

> "(8) That Linolex shall each month pay to G. G. S. all commissions earned on sales as the monies or any part thereof are collected from purchasers or lessees."

The final purported relevant contractual provision is contained in a letter agreement of July 22, 1975. This letter provides that Linolex "will pay the same thirty per cent rate on all leases quarterly in advance."

None of these provisions specifically refers to a situation where a customer fails to pay on its lease contract. Linolex argues that paragraph 8 of the July 10 letter establishes that plaintiff was entitled to commissions "as the monies . . . are collected . . . from leases." Since these monies have never been "collected," G. G. S. has never become entitled to the commissions. The July 22 letter provides that commissions will be paid on the leases "quarterly in advance" of collection. This tends to indicate that if paragraph 8 was intended to have the effect Linolex urges that this intent was modified by the later dated letter agreement. There is little to indicate the parties intended G. G. S. to be responsible for collection of accounts receivable.[11]

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11. Linolex argues that the July 22 letter merely changed the timing for payment of the commissions not the point at which the

(Footnote continued on next page.)

Paragraph 7 of the July 10 letter is the only provision which explicitly sets responsibility for costs related to sales made by G. G. S. (placing responsibility for collection of all costs on Linolex). While the paragraph does not explicitly relate to the entitlement to commissions, we feel it is the best indication that the parties intended Linolex to be responsible for noncollection of amounts owed by customers.

The behavior of the contracting parties comforts us in our conclusion that G. G. S. was entitled to the commissions before the actual payments were collected. Such conduct is useful to determine the "meaning that [the parties] themselves put upon any doubtful or ambiguous term. . . ." *Lembo* v. *Waters,* 1 Mass. App. 227, 233, 294 N. E. 2d 566, 569 (1973). It is useful because, as the Supreme Court has stated, "[t]here is no surer way to find out what parties meant, than to see what they have done." *Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273 (1877).

Here Linolex paid commissions prior to its collection of full payment from the customers. This suggests to us that Linolex believed commissions were earned prior to actual collection. Thus, we hold Linolex is not entitled to the setoff.

Accordingly, the decision of the district court is

AFFIRMED.

(Footnote continued from preceding page.)
right to such payment accrued. There is little to indicate that this was the effect intended. We also find such a construction to be equally as reasonable an interpretation of paragraph 8.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 3, 1980.

Before

Hon. Latham Castle, *Senior Circuit Judge*
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*

G. G. S. Inc., an Illinois corporation,
Plaintiff-Appellant,
Cross-Appellee,

Nos. 79-1574 and 79-1607

vs.

Linolex Systems Inc., a Delaware corporation,
Defendant-Appellee,
Cross-Appellant,

and

Minnesota Mining & Manufacturing Company, a Delaware corporation,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-3136

Thomas R. McMillen, *Judge.*

ORDER

On consideration of the petition for rehearing in No. 79-1574 and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

G. G. S. Inc.,
Plaintiff,
vs.
Linolex Systems, Inc. and Minnesota Mining & Manufacturing Co.,
Defendants.

No. 76 C 3136

DECISION

All parties have filed motions for summary judgment in the above case, plaintiff on the theory that defendant Linolex' notice of termination was ineffective and defendants on the theory that the notice, if effective, terminated the entire relationship. We find and conclude that Linolex' notice of termination was effective but that there may be genuine issues of material fact nonetheless.

Plaintiff was appointed as a distributor of Linolex' computers for a two year period beginning January 1, 1973. Paragraph 14 of the portion of the contract entitled "Term of Agreement and Termination" provided as follows:

> TERM: This Agreement shall remain in effect for a period of two (2) years from the first day of January of the year following the date hereof, and shall be renewed automatically for two (2) year extensions unless at least three (3) months prior to the expiration of the original or any extended term, as the case may be, one of the parties hereto notifies the other of its election to terminate this Agreement at the expiration of the expiring term. . . .

Paragraph 15 of the contract further provided:

> TERMINATION OF CONTRACT: This Agreement may be terminated at any time, for cause, by either party giving ninety (90) days written notice to the other. Such notice shall be valid and sufficient if dispatched by certified mail, postage prepaid, to the COMPANY or DISTRIBUTOR at their respective current principal and regular places of business. . . .

A similar provision was contained in par. 8 of the General Provisions of the contract which added the following amplification of pars. 14 and 15:

> NOTICE: All notices required in this Agreement shall be in writing and shall be deemed to be received if delivered personally or sent by mail to a proper agent of the COMPANY or DISTRIBUTOR, at their respective current principal and regular places of business. . . .

On September 29, 1975, defendant Linolex mailed a letter to plaintiff G. G. S., Inc. terminating the contract effective January 1, 1976 in accordance with par. 14 quoted above. The letter, dated September 26, 1975, was received by plaintiff on October 2, 1975. It was sent to an address which was not current and from which plaintiff had moved some time in December, 1974. This may have delayed receipt of the letter by a day or two, and was not in accordance with the requirements of pars. 14 and 8, above, but the record does not show whether the letter was received at the old address before October 2, 1975. We do not believe this is crucial to our decision with respect to notice.

The contract provides that it is fully integrated (par. 10 of the General Provisions) and that it is to be construed in accordance with Massachusetts law (par. 4 of the General Provisions). There is no patent ambiguity in the provisions which govern termination, and the parties do not submit any evidence of latent ambiguities or other facts which would require evidence over and above what is in the record now. Therefore, the construction and application of the contract is solely a question of law. See *Fitzsimmons* v. *Best*, 528 F. 2d 692, 694 (7th Cir. 1976).

There can be no question that the *mailing* of notice on September 29, 1975 satisfies the three months' termination requirement of par. 14, regardless of the fact that the notice was received by the plaintiff a few days after the expiration of the three months. We also find and conclude that the fact that the notice was not sent to plaintiff's "current principal and regular place of business" is not a substantial violation of the terms of the agreement. The plaintiff did receive the notice promptly. It does not contend that the two day delay in and of itself prejudiced or damaged it, but it merely contends that it is entitled to another two year contract because of defendant Linolex' failure to address the notice properly. We find and conclude that this would be an inequitable application of a technical provision of the contract, elevating form over substance. *Catch 22*, J. Heller.

The parties have cited no Massachusetts authority on this point. If any additional authority is necessary to support the foregoing analysis, however, defendants point to *Restaurant Associates Industries, Inc.* v. *Anheuser-Busch, Inc.*, 422 F. Supp. 1105 (S. D. N. Y. 1976), aff'd in part and reversed in part by an unpublished opinion of the Second Circuit (76-7638, 1977). 559 F. 2d 1205. We have been informed that the Court of Appeals did not disturb that portion of Judge Pollack's decision with respect to compliance with the notice provisions of the contract as discussed at 422 F. Supp. pp. 1107-09 although the Court of Appeals' decision is not of record. A similar but somewhat less applicable decision is *Music, Inc.* v. *Henry B. Klein Co.*, 245 A. 2d 650 (Pa. Super. Ct. 1968).

Plaintiff further contends that the termination was unauthorized under a second provision of par. 14 which states that "It is the intention of the Company [Linolex, a defendant] that this agreement shall be terminated only upon Distributor's [plaintiff's] failure to meet Company determined standards of performance." However, this provision is precatory and not enforceable on behalf of plaintiff. Furthermore, par. 15 permits termination at any time "for cause" upon ninety days notice. It would not be

rational to restrict the use of par. 14 to "cause," such as failure to abide by company standards of performance, when a perfectly applicable termination clause is contained in another portion of the contract "for cause."

Plaintiff has alleged various breaches of contract by defendant Linolex in par. 20 of the Complaint. Since the contract was terminated as of January 1, 1976, we must assume that these breaches occurred during the existence of the contract and therefore are separable from the issue of termination. For that reason, the damage claims in Count I, apart from any loss of profits which may be claimed following January 1, 1976, remain unless shown to be related exclusively to the termination issue. Furthermore, Count II alleges that the defendant Minnesota Mining & Manufacturing Co. tortiously induced defendant Linolex to terminate the contract. If this can be proved, plaintiff could also recover on Count II.

It Is Therefore Ordered, Adjudged and Decreed that the motion of the plaintiff for summary judgment on the issue of contract termination is denied, the motion of the defendants on the issue of contract termination is granted, and the balance of the defendants' motion for summary judgment is denied.

This case will be called for a report on status on Monday, July 31, 1978 at 11:00 a.m.

Enter:

/s/ THOMAS R. MCMILLEN
Judge, U. S. District Court

Dated: July 14, 1978

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

G. G. S. Inc.,
Plaintiff,

vs.

Linolex Systems, Inc. and Minnesota Mining & Manufacturing Co.,
Defendants.

No. 76 C 3136

DECISION ON PLAINTIFF'S PETITION FOR RECONSIDERATION

Plaintiff has filed a motion for reconsideration of our Decision entered July 14, 1978. The motion is accompanied by a memorandum filed August 21, 1978 to which is attached an affidavit by the same attorneys who signed the memorandum and who have filed appearances for the plaintiff. Assuming that the attorneys could properly testify in a case in which they represent the plaintiff, we find and conclude that the affidavit fails to raise a genuine issue of material fact concerning the effectiveness of defendant Linolex' termination of the contract between the parties.

Plaintiff contends that there is a "latent ambiguity" in the contract, despite the provisions of paragraphs 4 and 10 referred to on page 3 of our Decision. We have applied paragraph 15 of the contract in this case, permitting termination "for cause," thereby subsuming the unilateral and precatory language of paragraph 14 which we discussed on page 5 of our Decision. We note, furthermore, that the affidavit of the plaintiff's attorneys dated August 16, 1978 is itself unilateral, speaking of the intent

and belief of the plaintiff and its attorney in negotiating the contract but presenting no affirmative evidence that the defendants intended to be bound by the interpretation now being placed upon the contract by plaintiff's attorneys.

Since the court is dealing with an integrated contract and not one which can be modified, expanded, or otherwise interpreted by letters, conversations, or actions of the parties, the decision in *Fitzsimmons* v. *Best*, 528 F. 2d 692 (7th Cir. 1976) is completely applicable, as are similar cases applying Massachusetts law. E.g., *Jamesbury Corp.* v. *Worcester Valve Co.*, 443 F. 2d 205, 210 (1st Cir. 1971).

It Is Therefore Ordered, Adjudged and Decreed that plaintiff's motion for reconsideration is denied, and a pretrial order will be entered this date, to be complied with within thirty (30) days. Thereafter the case will be set for prompt trial on the remaining issues.

Enter:

/s/ THOMAS R. MCMILLEN
Judge, U. S. District Court

Dated: Nov. 8, 1978